

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LEVAUGHN G. WALKER,

Petitioner,

v.

THOMAS L. CARROLL, Warden, and
ATTORNEY GENERAL OF THE
STATE OF DELAWARE,

Respondents.

Civil Action No. 02-325-GMS

MEMORANDUM AND ORDER

Following a jury trial in the Delaware Superior Court, LeVaughn G. Walker was convicted of second degree murder, possession of a deadly weapon during the commission of a felony, and theft. He is presently incarcerated at the Delaware Correctional Center in Smyrna, Delaware, serving a sentence of thirty-eight years. Walker has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. As explained below, the court will dismiss Walker's petition as time barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1).

I. BACKGROUND

On February 9, 1996, a jury in the Delaware Superior Court found LeVaughn G. Walker guilty of murder in the second degree, possession of a deadly weapon during the commission of a felony, and felony theft. The charges were based on the March 23, 1995 stabbing and killing of seventeen-year-old Nicole Mosley. Walker was sixteen years old at the time. The Superior

Court sentenced Walker on April 18, 1996, to thirty-eight years imprisonment followed by decreasing levels of supervision. On direct appeal, the Delaware Supreme Court affirmed. *Walker v. State*, No. 226, 1996, 1997 WL 139810 (Del. Mar. 20, 1997).

On August 11, 1997, Walker filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. The Superior Court denied the motion on March 7, 2000. *State v. Walker*, No. IK95-04-00023-R1 (Del. Super. Ct. Mar. 7, 2000). The Delaware Supreme Court affirmed the denial of postconviction relief. *Walker v. State*, No. 124, 2000, 2000 WL 1505078 (Del. Oct. 2, 2000).

Walker has now filed the current petition for federal habeas corpus relief, challenging his convictions on the following grounds: (1) the police failed to notify his parents upon his arrest and before interrogation; (2) the state violated his right against self-incrimination by questioning him without a parent present; (3) trial counsel rendered ineffective assistance; and (4) the prosecutor failed to disclose mitigating evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). (D.I. 2, 3.) Walker has also filed two motions seeking appointment of counsel. (D.I. 13, 18.) The respondents argue that the petition is subject to a one-year period of limitation that expired before Walker filed it, and ask the court to dismiss it.

II. DISCUSSION

A. One-Year Period of Limitation

In the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Congress amended the federal habeas statute by prescribing a one-year period of limitation for the filing of habeas petitions by state prisoners. *Stokes v. District Attorney of County of Philadelphia*, 247

F.3d 539, 541 (3d Cir.), *cert. denied*, 122 S. Ct. 364 (2001). Effective April 24, 1996, the AEDPA provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

28 U.S.C. § 2244(d)(1).

Here, the Delaware Supreme Court affirmed Walker’s conviction and sentence on direct appeal on March 20, 1997. Walker was then allowed ninety days in which to file a petition for a writ of certiorari with the United States Supreme Court. *See* Supreme Court Rule 13.1.

Although Walker did not seek review from the United States Supreme Court, the ninety-day period in which he could have filed such a petition is encompassed within the meaning of “the conclusion of direct review or the expiration of the time for seeking such review,” as set forth in § 2244(d)(1)(A). *See Kapral v. United States*, 166 F.3d 565, 576 (3d Cir. 1999)(holding that on direct review, the limitation period of § 2244(d)(1)(A) begins to run at the expiration of the time for seeking review in the United States Supreme Court). Therefore, Walker’s conviction became final on June 18, 1997, ninety days after the Delaware Supreme Court affirmed his conviction.

The court’s docket reflects that Walker’s petition was filed on April 30, 2002. (D.I. 2.) A pro se prisoner’s habeas petition, however, is considered filed on the date he delivers it to prison officials for mailing to the district court, not on the date the court docket it. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Walker has not provided the court with any documentation establishing the date he submitted his petition to prison officials for mailing. The petition itself, however, is dated April 3, 2002. (D.I. 2.) In the absence of proof respecting the

date of delivery, the court deems Walker's habeas petition filed on April 3, 2002.

As the foregoing demonstrates, Walker's habeas petition was filed nearly five years after his conviction became final. That, however, does not necessarily require dismissal of the petition as untimely, because the one-year period of limitation may be either statutorily or equitably tolled. *See Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

B. Statutory Tolling

The AEDPA provides for statutory tolling of the one-year period of limitation as follows:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Here, Walker filed a Rule 61 motion for postconviction relief in the Superior Court on August 11, 1997. The Delaware Supreme Court affirmed the denial of postconviction relief on October 2, 2000. The respondents correctly acknowledge that the one-year period was tolled while Walker's postconviction proceedings were pending in the state courts from August 11, 1997, through October 2, 2000. By the time Walker filed his Rule 61 motion, however, 53 days of the one-year period had lapsed. An additional 547 days lapsed after October 2, 2000, before Walker filed his federal habeas petition on April 3, 2002.

In sum, 600 days lapsed during which no state application for postconviction relief was pending before Walker filed his federal habeas petition. The court thus concludes that applying the statutory tolling provision does not render the petition timely.

C. Equitable Tolling

The one-year period of limitation is not jurisdictional and may be equitably tolled. *Fahy*

v. Horn, 240 F.3d 239, 244 (3d Cir.), *cert. denied*, 122 S. Ct. 323 (2001); *Jones*, 195 F.3d at 159; *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998). According to the Third Circuit, equitable tolling applies:

only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.

Miller, 145 F.3d at 618-19 (citations omitted). In other words, equitable tolling “may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has ‘in some extraordinary way’ been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.” *Jones*, 195 F.3d at 159 (quoting *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998)).

The court has searched the record in an effort to discern why Walker failed to file his habeas petition within the one-year period of limitation. Despite the respondents’ request to dismiss the petition as untimely, Walker has not explained why he waited until April 3, 2002, to file his federal habeas petition. Based on its independent review of the record, the court cannot conclude that any extraordinary circumstances prevented Walker from complying with the one-year period of limitation. Accordingly, the doctrine of equitable tolling does not apply. The court will dismiss Walker’s habeas petition as untimely.

D. Motions for Appointment of Counsel and for Evidentiary Hearing

Walker asks the court to appoint counsel to represent him in this matter because he is incarcerated and unskilled in the law, and lacks adequate access to a law library. (D.I. 2, Att., 13, and 18.) It is well established that Walker has no Sixth Amendment right to counsel in this

habeas proceeding. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *United States v. Roberson*, 194 F.3d 408, 415 n.5 (3d Cir. 1999). A district court, however, may appoint counsel to represent an indigent habeas petitioner “if the interest of justice so requires.” Rule 8(c) of the Rules Governing Section 2254 Cases. For the reasons stated, the court has determined that Walker’s petition is time barred. Accordingly, his motion for appointment of counsel will be denied as moot.

Walker also asks the court to conduct an evidentiary hearing on his claim of ineffective assistance of counsel. (D.I. 2, Att.) Because his petition is time barred, the court is precluded from reviewing the merits of his ineffective assistance of counsel claim. Accordingly, the court will deny his request for an evidentiary hearing.

E. Certificate of Appealability

Finally, the court must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

When the court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the prisoner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.*

As explained above, Walker's federal habeas petition is barred by the one-year period of limitation. The court is convinced that reasonable jurists would not debate otherwise. Walker has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. LeVaughn G. Walker's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2) is DISMISSED, and the relief requested therein is DENIED.
2. Walker's motions for appointment of counsel (D.I. 13, 18) are DENIED AS MOOT.
3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated: October 3, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE